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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Tyler Jacobson, et al.,

10 Plaintiffs,

11 v.

12 American Family Insurance Company, et al.,

13 Defendants.

No. CV-17-04373-PHX-MTL

**ORDER**

14 Two Motions are currently pending before the Court: Defendant American Family  
15 Insurance Company's Motion for Summary Judgment (Doc. 48) and Plaintiffs Cathy,  
16 William and Tyler Jacobson's Cross-Motion for Summary Judgment (Doc. 50). The  
17 Motions are fully briefed. For the reasons explained below, Plaintiffs' Motion is granted  
18 with respect to the claim for breach of contract, as to Ms. Jacobson, only. Defendant's  
19 Motion is denied with respect to the breach of contract and bad faith claims. The Court  
20 reserves summary judgment on the negligence cause of action until after oral argument.<sup>1</sup>

21 **I. FACTUAL BACKGROUND**

22 Plaintiffs are Cathy, William and Tyler Jacobson. Cathy and William Jacobson are  
23 Tyler Jacobson's parents. The parents are, and at all relevant times were, named insureds  
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25 <sup>1</sup> The Court will hold oral argument on the issues not decided in this Order on February 6,  
26 2020. Oral argument is not necessary for the issues decided in this Order because it would  
27 not assist the Court. Additionally, the parties have had an opportunity to submit their  
28 arguments to the Court in their motions and "any error can be rectified by an appeal of the  
summary judgment." *Lake at Las Vegas Invrs Grp., Inc. v. Pac. Malibu Dev. Corp.*, 933  
F.2d 724, 729 (9th Cir. 1991); *see also Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir.  
1998).

1 on an automobile insurance policy with American Family Insurance Company. (*See* Doc.  
2 49 at 5.) Ms. Jacobson added her minor son, Tyler Jacobson, to the policy shortly after he  
3 turned 16. (Doc. 56 at 4.) No one disputes that Tyler Jacobson had coverage as a relative  
4 at that time. (*Id.*)

5 Tyler Jacobson purchased a motorcycle in September 2016, a few months after his  
6 20th birthday. (Doc. 49 at 1; and Doc. 51 at 6 and 8.) Neither Cathy nor William Jacobson  
7 were listed on the title of that vehicle. (Doc. 49 at 4; Doc. 51 at 3.) Ms. Jacobson obtained  
8 a quote for full coverage on the motorcycle. (Doc. 49 at 6; Doc. 51 at 4.) Tyler Jacobson  
9 opted for a policy with a different insurance company, Progressive Insurance. (Doc. 49 at  
10 2; Doc. 51 at 2.) The Progressive policy did not include underinsured motorist insurance.  
11 (Doc. 49 at 2; Doc. 51 at 2.) The parents' insurance policy provided underinsured motorist  
12 coverage for relatives. (Doc. 49 at 4.)

13 Another vehicle collided with 20-year-old Tyler Jacobson while he was riding his  
14 motorcycle, causing him injuries. (Doc. 49 at 2; Doc. 51 at 2.) The insurance company for  
15 the driver involved in the accident had a liability limit of \$100,000. (*Id.*) It paid Tyler  
16 Jacobson \$75,000 for his injuries and paid Cathy and William Jacobson collectively  
17 \$25,000 for loss of consortium. (*See id.*) Plaintiffs allege that Tyler Jacobson incurred more  
18 than \$220,000 in medical bills. (Doc. 51 at 5.) This amount is less than what the other  
19 driver's insurance company paid. The Jacobsons made a claim under their policy with  
20 Defendant. (Doc. 49 at 2; Doc. 51 at 2.)

21 Prior to the accident that gave rise to the claims at issue in this suit, Ms. Jacobson  
22 was the person who handled all of the interactions with the American Family insurance  
23 agent. (Doc. 56 at 3.) No one disputes that Ms. Jacobson told the insurance agent that she  
24 wanted her son to have coverage. (Doc. 56 at 4.)

25 Page 25 of the policy at issue says that relatives are given underinsured motorist  
26 coverage. (Doc. 56 at 6.) Page 7 of the policy says that people who own their own motor  
27 vehicles (other than off-road vehicles) are not relatives for coverage purposes. (Doc. 56 at  
28 7.) The insurance company notes that "relative" is a term of art in the policy, defined in a

1 separate definitions section. (Doc. 49 at 4; Doc. 51 at 3.) In the coverage section of the  
2 policy, the word “relative” appears in bold print. (Doc. 49-6 at 25.)

3 Ms. Jacobson says that the definition of relative seemed self-evident, not requiring  
4 reference to the definitions section. (Doc. 51 at 9.) Additionally, Ms. Jacobson told the  
5 insurance agent, Nicole Melody, that she wanted Tyler to have the same coverage as she  
6 and William Jacobson. (Doc. 51 at 7; Doc. 56 at 4.) Despite their denying coverage for the  
7 claims arising out of Tyler Jacobson’s accident, Ms. Jacobson continues to use American  
8 Family as her insurance provider. (Doc. 56 at 15.)

## 9 **II. PROCEDURAL BACKGROUND**

10 On October 30, 2017, Tyler Jacobson filed a lawsuit against American Family  
11 Insurance Company as well as a number of corporations whose names were not then  
12 known. (Doc. 1-1.) On November 29, 2017, American Family Insurance Co. removed the  
13 case to federal court. (Doc. 1.)

14 Tyler Jacobson’s parents – Cathy and William Jacobson – later added themselves  
15 as plaintiffs via an amended complaint. (Doc. 10.) The Plaintiffs added and later dropped  
16 the insurance agent and agency from the suit. (*Id.*) When the insurance agency and agents  
17 were defendants, this Court lost diversity (and thus remanded the case to state court). (Doc.  
18 21.) When they were dropped from the case, diversity was restored, and the case was  
19 removed to federal court again. (Doc. 22.)

20 On May 17, 2019, American Family filed a Motion for Summary Judgment. (Doc.  
21 48.) On June 17, 2019, the Jacobsons filed a Response as well as a Cross-Motion for  
22 Summary Judgment. (Doc. 50.) On July 17, 2019, American Family filed a Reply to the  
23 Response and Response to the Jacobsons’ Cross-Motion for Summary Judgment. (Doc.  
24 55.) On August 1, 2019, the Jacobsons filed a Reply to the Response to the Cross-Motion  
25 for Summary Judgment. (Doc. 57.) Thus, the Cross-Motions for Summary Judgment are  
26 fully briefed.

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### 1     **III.    LEGAL ANALYSIS**

#### 2           **A.     Legal Standard on a Motion for Summary Judgment**

3           Rule 56 of the Federal Rules of Civil Procedure governs motions for summary  
4 judgment. The Court may grant summary judgment when the movant shows that (1) there  
5 are no genuine issues of material fact; and (2) when the evidence is viewed in the light  
6 most favorable to the non-moving party, the movant is entitled to a favorable judgment as  
7 a matter of law. Fed.R.Civ.P. 56(a); *see also Adickes v. S. H. Kress & Co.*, 398 U.S. 144,  
8 157 (1970). Material facts are those which might affect the outcome of the suit. *Anderson*  
9 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact does not arise solely from  
10 allegations in pleadings; the non-moving party also has to produce affirmative evidence to  
11 rebut the moving party's motion. *Id.* at 257. When deciding a defendant's motion for  
12 summary judgment, the "mere existence of a scintilla of evidence in support of the  
13 plaintiff's position will be insufficient; there must be evidence on which the jury could  
14 reasonably find for the plaintiff" in order to deny a defendant's motion. *Id.* at 252.

#### 15           **B.     Cross-Motions for Summary Judgment on Breach of Contract**

16           A breach of contract claim requires (1) the existence of a contract; (2) breach of that  
17 contract; and (3) damages. *Thomas v. Montelucia Villas, LLC*, 302 P.3d 617, 621 (Ariz.  
18 2013). "An insurance policy is a contract." *Tolifson v. Globe American Cas. Co.*, 672 P.2d  
19 983, 984 (Ariz. Ct. App. 1983); *see also Moore v. Smotkin*, 283 P.2d 1029, 1031 (Ariz.  
20 1955) (defining a contract as "the expression by two or more persons of the common  
21 intention to effect their legal relations."). If Defendant breached the contract, Plaintiffs  
22 suffered damages because of Defendant's failure to pay the money to which Plaintiffs were  
23 entitled. Whether the Court will grant summary judgment on this claim thus depends on  
24 whether there is a genuine issue of material fact as to whether American Family breached  
25 its contract with the Jacobsons.

26           Arizona's reasonable expectations doctrine sets forth the circumstances that allow  
27 "[c]ourts [to] construe the written terms of insurance contracts to effectuate the parties'  
28 intent." *Liberty Ins. Underwriters, Inc. v. Weitz Co., LLC*, 158 P.3d 209, 212 (Ariz. Ct.

1 App. 2007). Only a party to a contract can invoke the reasonable expectations doctrine.  
2 *Cullen v. Koty-Leavitt Ins. Agency, Inc.*, 168 P.3d 917, 925 (Ariz. Ct. App. 2007) (*vacated*  
3 *in part on other grounds by Cullen v. Auto-Owners Ins. Co.*, 189 P.3d 344 (Ariz. 2008)).

4 In *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388 (Ariz.  
5 1984), the Arizona Supreme Court adopted the Restatement (Second) of Contracts  
6 § 211(3), which provides that “[w]here [a] party has reason to believe that the [other] party  
7 manifesting [] assent would not do so if he knew that the writing contained a particular  
8 term, the term is not part of the agreement.” *Id.* at 396. Restatement (Second) § 211(3)  
9 Cmt.(f), adopted in *Darner*, further provides that customers “are not bound to unknown  
10 terms which are beyond the range of reasonable expectation. . . .” *Id.* at 396.

11 When a customer asks for full coverage and the agent is silent about an exclusion,  
12 that can be evidence that the policy does not comport with a customer’s reasonable  
13 expectations. *See Do by Minker v. Farmers Ins. Co. of Ariz.*, 828 P.2d 1254, 1258 (Ariz.  
14 Ct. App. 1991). Further, *Gordinier v. Aetna Cas. & Sur. Co.*, 742 P.2d 277 (Ariz. 1987)  
15 provides a comprehensive synthesis of when “Arizona courts will not enforce even  
16 unambiguous boilerplate terms in standardized insurance contracts” because they might  
17 frustrate a party’s reasonable expectations.

18 1. Where the contract terms, although not ambiguous to the  
19 court, cannot be understood by the reasonably intelligent  
20 consumer who might check on his or her rights, the court will  
21 interpret them in light of the objective, reasonable expectations  
22 of the average insured;

23 2. Where the insured did not receive full and adequate notice  
24 of the term in question, and the provision is either unusual or  
25 unexpected, or one that emasculates apparent coverage;

26 3. Where some activity which can be reasonably attributed to  
27 the insurer would create an objective impression of coverage  
28 in the mind of a reasonable insured;

4. Where some activity reasonably attributable to the insurer  
has induced a particular insured reasonably to believe that he  
has coverage, although such coverage is expressly and  
unambiguously denied by the policy.

*Gordinier*, 742 P.2d at 283-84 (Ariz. 1987) (internal citations omitted).

1           The text of the policy at issue here includes underinsured motorist insurance  
2 coverage for relatives of the named insured living in the same household. (Doc. 49-6 at 25.)  
3 Notwithstanding this presumed coverage, the definition of relative excludes from coverage  
4 relatives of the named insured who own a motor vehicle titled solely in the relative's name.  
5 (*Id.* at 7.) In her deposition, Ms. Melody testified that when Tyler Jacobson was first added  
6 to the policy at age 16, Ms. Jacobson asked that he have the same coverage as his parents.  
7 (Doc. 56 at 4.) Ms. Melody further testified that uninsured motorist coverage was  
8 consistent with Ms. Jacobson's desire. (*Id.* at 5). American Family does not dispute any of  
9 this. (*Id.* at 4-5.)

10           Despite knowing Ms. Jacobson's desire that Tyler Jacobson have full coverage,  
11 neither American Family nor its agents gave Ms. Jacobson a clear disclaimer that Tyler  
12 Jacobson's coverage would vanish if he bought a vehicle of his own. Ms. Melody's failure  
13 to warn Ms. Jacobson about the exclusion under these circumstances was an activity  
14 reasonably attributable to the insurer that created both an objective impression of coverage  
15 in the mind of a reasonable insured and more specifically, the silence induced Ms. Jacobson  
16 to believe that her son had underinsured motorist coverage.

17           Defendant relies heavily on *Beaver v. Am. Family Mut. Ins. Co.*, 324 P.3d 870 (Ariz.  
18 Ct. App. 2014) for the proposition that courts have upheld the Policy's definition of  
19 relative. (Doc. 48 at 16.) This reference is inapposite since that case turned on the policy  
20 scope of the Arizona uninsured motorist statute, rather than the reasonable expectations  
21 doctrine. Defendant also notes that this Court held in *Abbass v. Am. Fam. Ins. Group*, 2013  
22 WL 3805147 (D. Ariz. July 19, 2013), that the policy's definition of relative does not  
23 violate public policy. That is true as far as it goes. But the Court specifically declined to  
24 address the reasonable expectations doctrine in that case. *Abbass*, at \*3. The Court does  
25 not find that those cases rescue Defendant from consequences of the agent's failure to  
26 apprise the Jacobsons of the consequences that would come about if Tyler Jacobson bought  
27 a vehicle of his own.

28           The Court reforms the contract to meet the reasonable expectations of Ms. Jacobson

1 and grants Plaintiffs' Cross-Motion for Summary Judgment on the breach of contract  
2 claim, as to Ms. Jacobson only. The parties are directed to address, at oral argument, how  
3 the court should proceed with respect to the breach of contract claim as asserted by William  
4 and Tyler Jacobson under the reasonable expectations doctrine.

5 **C. Defendant's Motion for Summary Judgment on Bad Faith**

6 A claim for bad faith arises when an insurer intentionally denies or fails to process  
7 or pay a claim without a reasonable basis. *Zilisch v. State Farm Mutual Auto. Ins. Co.*, 995  
8 P.2d 276, 279 (Ariz. 2000) (citing *Noble v. Nat'l Am. Life Ins. Co.*, 624 P.2d 866, 868  
9 (Ariz. 1981)). In other words, the insurance company must immediately conduct an  
10 adequate investigation into the claim, act reasonably in evaluating that claim, and promptly  
11 pay a legitimate claim. *Zilisch*, 995 P.2d at 280. A court is likely to find that an insurance  
12 company acted reasonably when a claim is fairly debatable. *Id.* at 279. The insurance  
13 company's belief in whether something is fairly debatable is a question of fact for the jury.  
14 *Id.* Even assuming fair debateability, which is necessary to find in an insurer's favor but is  
15 not always dispositive, the key question is "whether there is sufficient evidence from which  
16 reasonable jurors could conclude that in the investigation, evaluation and processing of the  
17 claim, the insurer acted unreasonably and either knew or was conscious of the fact that its  
18 conduct is unreasonable." *Id.* at 280.

19 Genuine issues exist on the bad faith claim. These issues include whether the insurer  
20 acted reasonably in its evaluation and processing of the claim, given Ms. Jacobson's  
21 statements to her insurance agent about wanting to be covered and the agent's failure to  
22 notify the Jacobsons of what circumstances would result in a change of coverage. The  
23 Court denies Defendant's Motion for Summary Judgment with respect to the Jacobsons'  
24 bad faith claim. This issue shall be tried to a jury.

25 **IV. CONCLUSION**

26 **Accordingly,**

27 **IT IS ORDERED granting in part** Plaintiffs' Cross-Motion for Summary  
28 Judgment (Doc. 50) on breach of contract, with respect to Ms. Jacobson only.

**IT IS FURTHER ORDERED denying in part** Defendant's Motion for Summary Judgment (Doc. 48) on breach of contract, with respect to Ms. Jacobson, and on bad faith.

**IT IS FURTHER ORDERED** reserving the Court's decision on summary judgment on breach of contract, as to Tyler and William Jacobson, and negligence, until after the oral argument set for Thursday, February 6, 2020.

**IT IS FURTHER ORDERED** that at oral argument the parties shall be prepared to discuss the Motions for Summary Judgment on the Jacobsons' negligence claim, including:

1. Whether an expert opinion affidavit is required;
2. Whether Defendant's failure to raise the expert opinion affidavit requirement in its first responsive pleading and thereafter constitutes a waiver; and
3. The extent to which A.R.S. § 20-259.01 applies to this case, including the 2016 amendments to § 20-259.01 and the general effective date of those amendments.<sup>2</sup>

**IT IS FURTHER ORDERED** that, no later than February 3, 2020, Defendant American Family shall either provide the Court with the “form” signed by the Plaintiffs that manifests the basis of its contention that § 20-259.01 applies or direct the Court to its location in the record.

**IT IS FURTHER ORDERED** that the parties shall be prepared to discuss how the breach of contract claim may proceed with respect to William and Tyler Jacobson and whether the reasonable expectations doctrine applies to them.

**IT IS FINALLY ORDERED** that the time set for oral argument on Thursday, February 6, 2020, will also serve as a trial setting conference. The parties shall be prepared to discuss a proposed length of trial and potential trial dates.

Dated this 31st day of January, 2020.

Michael T. Liburdi  
Michael T. Liburdi  
United States District Judge

<sup>2</sup> See Ariz. Const. art. 4, pt. 1, section 1(3).